IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Case No. 1:14-cv-1500-CKK-PAM-APM

INDEPENDENCE INSTITUTE'S CONSOLIDATED OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Introduction

The Federal Election Commission ("FEC" or "Commission") has failed to provide any authority justifying the regulation of genuine issue advocacy, unconnected to any campaign or candidacy, as an electioneering communication. Consequently, it has failed to carry its burden under exacting scrutiny, and the Independence Institute is entitled to summary judgment.

Argument

I. The Independence Institute differs sharply from Citizens United.

a. The FEC recycles its argument—already rejected by the D.C. Circuit—that *McConnell* and *Citizens United* foreclose the Institute's challenge.

Principally, the FEC and its *Amici* rely on two Supreme Court cases: the facial ruling in *McConnell v. FEC*, 540 U.S. 93 (2003), and the as-applied ruling in *Citizens United v. FEC*, 558 U.S. 310 (2010). *See, e.g.*, FEC Br. at 18; *Amici* Campaign Legal Center ("CLC") et al. Br. at 6. Neither case controls, because facial rulings do not foreclose as-applied challenges, and because the facts of *Citizens United* differ significantly from those presented here.

First, *McConnell* was a facial ruling. As the *McConnell* Court itself said, "our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement." *Id*. at 199.[1]

This leaves only *Citizens United*. *See, e.g.*, FEC Br. at 25 (asserting "*Citizens United* directly and completely forecloses all of plaintiff's constitutional arguments. . . ."). But the Court

[1] To the extent that the FEC relies upon converting the Institute's case to a facial challenge, FEC Br. at 18 n.4, *Citizens United* addressed the issue, holding that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United*, 558 U.S. at 331 (citing *United States v. Nat'l Treasury Emp's. Union*, 513 U.S. 454, 478 (1995)). That is because successful facial challenges are, appropriately, rare and the Supreme Court will "neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants." *Nat'l Treasury Emp's. Union*, 513 U.S. at 478. The Institute claims that the electioneering communications cannot be constitutionally applied to its intended speech, not that it is overbroad in every instance.

of Appeals has already held that *Citizens United* does *not* foreclose this challenge. *Indep. Inst. v. FEC*, 816 F.3d 113, 116-17 (D.C. Cir. 2016); Mot. Sum. Judg. at 17. This is for two reasons. First, the Institute and Citizens United differ in organizational mission and activity, as reflected in their differing tax status. Second, the ad at issue in this case cannot be fairly compared to the ads at issue in *Citizens United.*[2]

Consequently, this Court must apply its own exacting scrutiny analysis to these particular, as-applied facts.

b. The difference between the Institute's tax status and that of Citizens United is material.

After examining the Institute's claims, the D.C. Circuit held: "*Citizens United* . . . did not address whether a speaker's tax status or the nature of the nonprofit organization affects the constitutional analysis of BCRA's disclosure requirement." *Indep. Inst.*, 816 F.3d at 116-17. Ignoring this clear and binding holding, the FEC claims that "[t]he fact that plaintiff is organized under a different subsection of the tax code than Citizens United does not render this case 'distinctly different'. . . ." FEC Br. at 29 (internal citation omitted). *See also* Mot. Summ. J. at 21 (comparing *Indep. Inst.*, 816 F.3d at 116 *with* V. Compl. at 20 ¶¶ 91-92 (ECF No. 1)).

i. As a § 501(c)(4) organization, Citizens United could engage in politics, something the Institute is barred from doing under § 501(c)(3).

Citizens United was (and remains) a § 501(c)(4) organization, a fact that was before the Supreme Court because it was specifically addressed in that case's district court opinion. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008) (three judge-court). And the Supreme Court noted that Citizens United had been "disclosing its donors for years." *Citizens United*, 558

[2] The Court of Appeals did not reach this issue, reasoning that the Institute was entitled to a three-judge court based upon the nature of its nonprofit organization. *Indep. Inst.*, 816 F.3d at 117.

U.S. at 370.[3] Meanwhile, the Institute, as a § 501(c)(3) organization, may not intervene in political campaigns and its donor list is generally protected as a matter of federal law.

Congress has specifically commanded "the Commission and the Internal Revenue Service [to] consult and work together to promulgate rules, regulations, and forms which are mutually consistent." 52 U.S.C. § 30111(f). Consequently, the very different missions and Internal Revenue Service ("IRS") treatment of § 501(c)(3) and § 501(c)(4) organizations is relevant to this Court's analysis of the ways in which BCRA burdens groups like the Institute more heavily than it burdens § 501(c)(4) groups.[4] Significantly, the IRS, through the tax code and its regulations, allow § 501(c)(4) organizations to engage in political activity. In stark contrast, the penalty for political intervention by a § 501(c)(3)'s is swift and severe.

Section 501(c)(4) organizations, like Citizens United, can engage in activity supporting or opposing candidates—the very activity § 501(c)(3) organizations, like the Institute, are prohibited from doing. *See* 26 U.S.C. § 501(c)(3) (prohibiting "participat[ion] in, or intervene[ntion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."). The only difference between what § 501(c)(4)s and § 527s, such as PACs, may do is that the former cannot engage in political activity as their primary purpose. *See*, *e.g.*, Rev. Rul. 81-95; 1981-1

[3] The FEC claims Citizens United only disclosed "donors to its connected political committee or PAC." FEC Br. at 32 (citing *Citizens United*, 558 U.S. at 370). Nothing in the cited page indicates a connected PAC, and the Court's language strongly suggests that it viewed Citizens United itself as the disclosing entity. Perhaps the record was unclear on this point, but that is further reason to doubt *Citizens United*'s application here.

[4] *See* Mot. Summ. J. at 21 n.12 (discussing 11 C.F.R. § 100.29(c)(6) and the FEC's attempt to harmonize tax and campaign finance law regarding § 501(c)(3) activity). Because the FEC failed to address several considerations in its rulemaking, this Court set the rule aside and remanded for further action by the Commission on the rule. *Shays v. FEC*, 337 F. Supp. 2d 28, 127-28, 130 (D.D.C. 2004), *aff'd by* 414 F.3d 76, 96 (D.C. Cir. 2005). The Commission failed to take any such action, leaving 11 C.F.R. § 100.29(c)(6) ineffective.

C.B. 332; I.R.S. Priv. Ltr. Rul. 1996-9652026 at *22 (Oct. 1, 1996) ("It follows that any activities constituting prohibited political intervention by a section 501(c)(3) organization are activities that must be less than the primary activities of a section 501(c)(4) organization, which are, in turn, activities that are exempt functions for a section 527 organization."). The result is that the decision to label the Institute's issue speech as "electioneering" necessarily bears the implication, and both the reputational and enforcement risk, that the Institute has done something *illegal.* A § 501(c)(4) organization faces no similar chill.

ii. Section 501(c)(3) organizations that violate the political activity prohibition face substantial penalties.

Under the tax regulations, organizations that participate in political campaigns are "action organizations." *See, e.g.*, 26 C.F.R. § 1.501(c)(3)–1(c)(3)(iii) (defining "action organization"). To determine if an § 501(c)(3) organization has tread into impermissible waters, and thus become an "action organization," the IRS employs an eleven factor "facts and circumstances" test. *See, e.g.*, Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 330; Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. But the IRS specifically recognizes that "Section 501(c)(3) organizations may take positions on public policy issues. . ." so long as the issue advocacy does not "function[] as political campaign intervention." Rev. Rul. 2007-41, 2007-25 I.R.B. at 1424. The IRS clarifies that this is not an express advocacy standard, but rather that "any message favoring or opposing a candidate" may trigger the prohibition. *Id*.[5]

[5] This bears some resemblance to the Promotes, Attacks, Supports, or Opposes standard in the backup definition for electioneering communications. 52 U.S.C. § 30104(f)(3)(A)(ii); *see* Section IV, *infra*. Although the IRS's "facts and circumstances" test provides the Service with near-absolute discretion to determine whether a particular action is campaign intervention, the FEC officially designating something an "electioneering communication" would likely be relevant to that determination.

Violating this prohibition carries heavy penalties.[6] The politically-active § 501(c)(3) faces an initial 10 percent tax on the amount of the political expenditure, 26 U.S.C. § 4955(a)(1), with a further penalty of up to *100 percent* available if the violation is not corrected during the tax year. 26 U.S.C. § 4955(b)(1). Likewise, the § 501(c)(3) cannot simply convert to a § 501(c)(4) if it violates the anti-campaign rule. 26 U.S.C. § 504(a).

Illegal campaign intervention also triggers monetary penalties, levied as a tax, on the managers and employees[7] of the § 501(c)(3). For the initial penalty, the managers are taxed at 2.5% of the amount of the political expenditure. 26 U.S.C. § 4955(a)(2). If the manager "refused to agree to part or all of the correction," then she is subject to "a tax equal to 50 percent of the amount of the political expenditure." 26 U.S.C. § 4955(b)(2). Managers are jointly and severally liable, 26 U.S.C. § 4955(c)(1), for up to $5,000 per initial violation and $10,000 for the failure to correct. 26 U.S.C. § 4955(c)(2). Thus, the individuals involved with impermissible political activity face personal consequences.[8]

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[6] *Amici* CLC et al. suggest that because some organizations and managers violate the tax code, then it is no protection against impermissible candidate activity by § 501(c)(3) organizations. *Amici* CLC et al. Br. at 21 n.7. That some break the tax law is no basis for the FEC to regulate the Institute, which does not, nor a sufficient basis upon which to set aside decades of precedent specifically protecting the discussion of political issues by civil society groups. To the contrary, the Supreme Court has consistently demanded a tight fit rather than the "prophylaxis upon prophylaxis approach" to campaign finance regulation *Amici* suggest. *McCutcheon v. FEC*, 572 U.S. ___, ___, 134 S. Ct. 1434, 1458 (2014) (Roberts, C.J., plurality opinion) (collecting cases).

[7] The political activity penalty can be applied to "any officer, director, or trustee of the organization" or "any employee of the organization having authority or responsibility with respect to [a political] expenditure." 26 U.S.C. § 4955(f)(2)(A)-(B).

[8] These penalties are not mere threats. Under 26 U.S.C. § 6852(a), the IRS may immediately assess these "taxes" (that is, the Service need not wait until the end of the taxable year). Congress also allows the IRS to seek an injunction to stop further violations of the § 501(c)(3) prohibition on political activity, 26 U.S.C. § 7409(a). The Treasury Regulations provide for a quick resolution of flagrant political activity by a § 501(c)(3) organization. Under 26 C.F.R. § 301.7409-1(b), the violating organization has only ten calendar days to reply to the IRS's letter notifying of the violations. Thereafter, the Commissioner of the IRS may "personally determine whether to forward to the Department of Justice a recommendation that it immediately bring an

Taken together, the Internal Revenue Code provides the IRS with substantial penalties applicable to any § 501(c)(3) or its officers that "intervene" in a campaign. The FEC's confidence that its labeling an entirely-permissible issue advertisement as "electioneering" will not draw these penalties down upon the Institute is cold, and baseless, comfort.

iii. Tax law and Supreme Court precedent protect donors to § 501(c)(3) organizations to a greater extent than donors to § 501(c)(4) groups.

26 U.S.C. §§ 6104(c)(3) and (d)(3) highlight that, unless there is a specific reason to do so, the tax code abhors general public disclosure—except when an organization has the major purpose of participating in politics. *See, e.g.*, 26 U.S.C. § 6104(d)(3)(A) (removing the *exemption* from public disclosure, and thereby permitting disclosure of contributors, to "a political organization exempt from taxation under [26 U.S.C.] section 527").[9]

Supreme Court precedent specifically protects nonprofits from expansive donor disclosure—particularly when not discussing *candidacies*. *See, e.g.*, Mot. for Sum. J. at 11. For example, in *NAACP v. Button*, 371 U.S. 415, 417 (1963), the national civil rights organization partnered with its newly-formed sister organization, the NAACP Legal Defense and Education Fund[10] to challenge Virginia's ban on attorney solicitation. *Id.* at 419. That case, in turn, helped formed the basis for the Supreme Court's ruling, in *Buckley v. Valeo*, "that compelled disclosure,

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action to enjoin the organization from making further political expenditures." *Id*. The U.S. District Courts are empowered to issue the injunctions in such matters. 26 U.S.C. § 7409(b).

[9] *Cf.* 26 U.S.C. § 527(k)(2)(C) (providing that the IRS "shall make the entire database of notices and reports which are made available to the public under paragraph (1) searchable by the following items. . . (C) Contributors to the organizations").

[10] As noted in its coverage of the *Bush v. Orleans Parish School Board*, 364 U.S. 500 (1960), the Federal Judicial Center's research found that "[i]n 1940, the [NAACP] established the Legal Defense and Educational Fund, Inc., to direct its litigation efforts. . . [and] was established to accept tax-deductible contributions that could not be accepted by the NAACP because of its status as a lobbying organization." Federal Judicial Center, Bush v. Orleans Parish School Board and the Desegregation of New Orleans Schools: Biographies, Website http://www.fjc.gov/history/home.nsf/page/tu_bush_bio_naacp.html. In other words, the NAACP set up a § 501(c)(3) arm to separate its lobbying and political activity from other charitable work.

in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. 1, 64 (1976) (per curiam) (citing *Button* among other civil rights cases). In short, when speaking of privacy of association and belief in the context of issue advocacy, the Court was referring specifically to action by § 501(c)(3) analogues.

iv. The out-of-circuit authority supplied by the Commission and *Amici* is inapposite.

To support its view that *Citizens United* forecloses any distinction among entities based upon their tax status, the Commission cites a number of out-of-circuit cases. *See* FEC Br. at 19. None are controlling.

First, in what the FEC misnames "*Independence Institute II*,"[11] a Colorado provision regulating electioneering communications survived an as-applied challenge. FEC Br. at 19 (discussing *Indep. Inst. v. Williams*, 812 F.3d 787, 794 (10th Cir. 2016)).[12] But the underlying communication at issue in *Williams* spoke directly about a single candidate running for governor, and suggested his position on the issue being discussed. *Williams*, 812 F.3d at 790. By contrast, the communication that the Institute seeks to make about the Justice Safety Valve Act encourages Coloradoans to contact *both* of the state's U.S. senators, not merely the one running for re-election. And *Williams* presented a potential difficulty in determining a remedy: unlike the federal statute at issue here, Colorado law did not and does not contain an unquestionably

[11] "*Independence Institute II*" is misleading as that matter is entirely unconnected to the question before this Court. There, the Tenth Circuit examined a state law provision, and not BCRA, and the FEC was not a party. The Institute will consequently refer to that matter as *Williams.*

[12] *Williams* examined a state law that specifically allowed for the disclosure of only *earmarked* contributions. *Williams*, 812 F.3d at 790 n.1 ("The Secretary interprets the [disclosure] requirement to apply only to donations *specifically earmarked* for electioneering communications. In other words, the donor must intend the donations be used for electioneering communications and not for other activities of the speaker."). The Institute preserves its argument that the FEC's lackluster defense of 11 C.F.R. § 104.20(c)(9) in the *Van Hollen* litigation still leaves the earmarking limitation in doubt, which affects the burdens on and harm to the Institute. *See* Mot. for Summ. J. at 9 n.3.

constitutional back-up definition addressing speech supporting or opposing (as opposed to merely naming) candidates.

Many of the Commission's remaining cases involve not genuine issue speech, but rather communications that more comfortably rest within the "unambiguously campaign related" standard applicable here. Furthermore, many of those cases involve statutes that would have protected the Institute's speech from being regulated in the first instance.

In its analysis of *Delaware Strong Families v. Attorney General of Delaware*, the FEC ignores the Institute's argument that there be some connection between electioneering communications regulation and actual election activity, and instead focuses on the Third Circuit's language on express advocacy. FEC Br. at 19 (discussing 793 F.3d 304 (3d Cir. 2015) ("*DSF*"), *cert. denied sub nom. Del. Strong Families v. Denn*, 579 U.S. ___, 136 S. Ct. 2376 (2016)) ("disclosure requirements are not limited to express advocacy and that there is not a rigid barrier between express advocacy and so-called issue advocacy") (internal quotation marks and citation omitted). The Third Circuit, however, applied exacting scrutiny to the specific facts of that as-applied case, just as this Court must do here.

As a result of the FEC's emphasis on the lack of "express advocacy" in *DSF*, rather than the "fit" between the communication at issue there and Delaware's disclosure requirements, the Commission glosses over the substantial difference between these cases. The plaintiffs in *DSF* were engaged in the distribution of voter guides, which the Third Circuit specifically found to be "election-related." *DSF*, 793 F.3d at 308. That voter guide was designed to "impact voter choice" by informing the electorate of stances taken by major-party candidates for office. *Id*. But the Institute's ad does not speak to stances *already taken* by candidates—it asks that the people of Colorado ask their senators, one of whom happened to be a candidate for re-election, to sponsor

a specific piece of legislation. Even if a voter could physically take the Institute's proposed broadcast directly into the voting booth, as she might have done with the DSF voter guide, it would not provide her with very much useful information with which to analyze the candidates. It would not tell her if either senator supported the measure, or why they opposed it, or even where opposing candidates stand on the Act. The DSF voter guide did all of these things, and was consequently "unambiguously campaign related."

Center for Individual Freedom v. Tennant, 706 F.3d 270 (4th Cir. 2013) fares no better. *Amici* CLC Br. at 3-4; *id*. at 20. That case, a general challenge to West Virginia's electioneering communication regime, was brought by a pair of "§ 501(c)(4) organizations that engage," unlike the Institute, "in election-related speech." *Tennant*, 706 F.3d at 275. The § 501(c)(4) organizations sought to invalidate, as underinclusive, *id*. at 285, West Virginia's statute exempting § 501(c)(3) organizations from that electioneering communications regime. The Fourth Circuit struck the provision, which was "identical" to a regulatory exception that existed under BCRA. *Id*. at 289; 11 C.F.R. § 100.29(c)(6) (repealed Jan. 19, 2006). The court then observed that "legislatures must base their conclusions on substantial evidence," and relied on this Court's administrative law decision in *Shays*, 337 F. Supp. at 126-128, for the proposition that the West Virginia legislature could not have based its exception on "substantial evidence." *Id*.; *see Shays*, 337 F. Supp. 2d at 128 (finding that Defendant FEC "failed to conduct a 'reasoned analysis'" in promulgating the exception). Such a concern is unnecessary here, where the Parties have provided enough information for this Court to conduct a reasoned, exacting analysis of the application of the law to *a specific* § 501(c)(3) organization producing *specific* non-election-related content.

Moreover, *amici* miss the *Tennant* Court's far more consequential holding relating to the § 501(c)(4) plaintiffs' challenge to West Virginia's "grassroots lobbying" provision, which exempted communications similar to the Institute's from being regulated as electioneering communications at all. Applying exacting scrutiny, the Fourth Circuit upheld the provision, finding that language similar to BCRA's backup definition—the "Promote, Attack, Support, Oppose," or "PASO," standard—survived constitutional scrutiny, *Tennant*, 706 F.3d at 287,[13] while observing that the exception properly worked to "avoid burdening pure issue advocacy." *Id*. at 288. *Tennant* works for, not against, the Institute.

The FEC's remaining cases, buried in a string cite, are all inapposite. FEC Br. at 21. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 471 (7th Cir. 2012) (comprehensive facial challenge brought by a § 501(c)(4) to an Illinois statute that, *inter alia*, exempted § 501(c)(3) organizations); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 122 (2d Cir. 2014) (unsuccessful challenge by § 501(c)(4) organization and its § 527 affiliate to an electioneering statute reaching only speech meeting the PASO standard); *Real Truth About Abortion v. FEC*, 681 F.3d 544, 545 (4th Cir. 2012) (vagueness challenge to federal rules determining PAC status, not electioneering communications reporting duties, brought by a § 527 political organization); *Free Speech v. FEC*, 720 F.3d 788, 791 (10th Cir. 2013) (same challenge, brought by a Wyoming entity); *SpeechNow.org v. FEC*, 599 F.3d 686, 697 (D.C. Cir. 2010) (challenge to PAC requirements by a group seeking to expressly advocate, and which specifically disclaimed any challenge to one-time independent expenditure reporting); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) (facial challenge brought against an electioneering communications statute requiring *no* donor disclosure); *Human Life of Wash., Inc. v. Brumsickle*,

[13] *See infra* at Section IV.

624 F.3d 990, 1018 (9th Cir. 2010) (upholding disclosure statute because, in that court's view, the state's informational interest in disclosure is *higher* for ballot-measure elections than in candidate elections).

This Court has a duty to perform an independent analysis of the record and apply exacting scrutiny. None of the FEC's, or *Amici*'s, out-of-circuit authority stands against that proposition, and none of their proffered cases involve comparable circumstances.

II. Not all speech that mentions a candidate is electioneering, and the Institute's ad is far from any gray area, for it is entirely focused on a legislative issue.

Speaking about a political issue, discussing an election, discussing a candidate as such, and advocating for or against that candidate's election, are not all the same thing. But the FEC has conflated them. FEC Br. at 1. Still, the commonsense fact remains: even if *some* issue discussions are cloaked invitations to vote a particular way, and even if those communications are sufficient to facially uphold a law, it does not follow that this is true of the Institute's particular speech. Exacting scrutiny requires a more careful approach than the reductionist model preferred by the Commission. In short, there is a range of political discussion that has nothing to do with *candidate advocacy*, and the Institute's proposed ad is far from that line.

a. Express advocacy is a subset of "unambiguously campaign related" speech.

Express advocacy and its functional equivalent are not the *only* form of speech other than "genuine issue speech."[14] This is obvious: commercial speech is one example that addresses neither issues nor elections. But even political speech is on a spectrum: at one end is genuine issue speech, and at the other end sits express advocacy to vote for or against a candidate. *See* V.

[14] *Buckley* clarifies that speech must be "unambiguously campaign related" to compel disclosure under campaign finance laws. *See*, 424 U.S. at 81. It may well be that the functional equivalent of express advocacy test from *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) ("*WRTL II*"), is the *best* test, in practice, for drawing this distinction. But it is not the *only* test under which the Institute prevails. *See* Section IV, *infra*, (discussing the statutory backup "PASO" definition and its use in the states).

Compl. at 19-20, ¶¶ 89-90 (ECF No. 1). In the middle is speech that is clearly related to the campaign and candidate, but does not contain an express call to vote. This was the speech at issue in *Citizens United*: to the extent it was political at all, it discussed then-Senator Clinton's *candidacy*, her fitness for office, and her character. The Institute's ad is issue speech focused on a legislative bill, entirely divorced from any candidacy.

The FEC is confused, believing that express advocacy and its functional equivalent are the same "repackaged" idea as *Buckley*'s "unambiguously campaign related" test. FEC Br. at 16. It is not. Instead, express advocacy and its functional equivalent is a *subset* of "unambiguously campaign related" speech. So while express advocacy and its functional equivalent is necessarily "unambiguously campaign related," other, non-express advocacy communications can also be *about* a campaign, without taking a *position* on the campaign.

If an ad comes close to outright advocacy, but does not use express words to that effect, it is what the *McConnell* Court called the "functional equivalent" of express advocacy which are "ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *McConnell*, 540 U.S. at 206. The *WRTL II* Court further provided that an ad is the functional equivalent of express advocacy if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 470. Even still, in describing the scope of its "functional equivalent of express advocacy" test, the *WRTL II* Court also described a genuine issue ad—another, distinct, category of speech. Such ads "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id*. at 470.

Even under the FEC's interpretation, the *Citizens United* ads—the only precedent that could possibly bind this court and overrule *Buckley*'s protection of genuine issue speech—sit in

this gray area on the issue-speech-to-express-advocacy spectrum. As this case exemplifies, the *Citizen United* ads may not have been the functional equivalent of express advocacy (although *Hillary: The Movie* unquestionably was) because they could be interpreted "other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 470.[15] The FEC itself believes that the *Citizen United* ads were commercial transactions. *See, e.g.*, FEC Br. at 22; *cf.* Mot. for Summ. J. at 35 n.22 ("To the extent they did not function as express advocacy, the *Citizen United* ads were commercial speech. . . .") . But the *Citizens United* ads clearly did *not* fit within *WRTL II*'s description of an issue ad. They did not "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *WRTL II*, 551 U.S. at 470.

The "unambiguously campaign related" standard provides the valuable service of categorizing speech that is clearly about a candidacy, but nevertheless falls shy of advocating for or against a candidate. Indeed, *WRTL II* clarified that issue speech would "not mention an election, candidacy, political party, or challenger; and [would] not take a position on a candidate's character, qualifications, or fitness for office." *Id.* These are not characteristic of the *Hillary* ads. *See Citizens United*, 558 U.S. at 320 ("Each ad includes a short (and, in our view, pejorative) statement *about Senator Clinton* . . . "); *id.* at 368 ("The ads . . . contained pejorative references *to [Clinton's] candidacy*") (emphasis added).

This distinction can also be found in the D.C. Circuit's en banc decision in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (en banc) ("*Buckley '75*") *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). The FEC does not believe that decision is relevant because it "'bears no

[15] The Institute has argued, and preserves the argument, that the ads were in fact express advocacy or its functional equivalent. But even if this Court disagrees, that does not mean the ads were not unambiguously related to the 2008 presidential election. *See* Mot. for Summ. J. at 34.

resemblance to the disclosure requirements in BCRA section 201 and sheds no light on the Court's consideration of them'" FEC Br. at 35 (quoting *Indep. Inst. v. FEC*, 70 F. Supp. 3d 502, 514-15 n.17 (D.D.C. 2014), *rev'd in part* 816 F.3d 113 (D.C. Cir. 2016)). But *Buckley '75* is highly relevant, for the scope of § 437a allowed a similar regulatory scope: any mention of a candidate, regardless of whether that mention was related to his or her campaign. Mot. for Summ. J. at 28 n.18; *Buckley*, 519 F.2d at 870 (section 437a could extend to "groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance"). Left unchecked, § 437a would have reached the issue-focused activity of groups such as "Common Cause, the American Conservative Union, the American Civil Liberties Union and… environmental groups." *Id.* at 877 (quoting floor statement of Rep. William Frenzel, 120 Cong. Rec. H. 10333 (daily ed., Oct. 10, 1974)).[16] The Independence Institute falls in the same category as the American Civil Liberties Union or Common Cause: educational charities speaking out on issues and official actions, not participating in politics.

This portion of *Buckley '75* was unreviewed by the Supreme Court or any subsequent *en banc* decisions of the Circuit, and its holding—that it is unconstitutional to regulate nonprofit, nonpartisan speech unrelated to campaigns—remains binding authority. *Buckley*, 424 U.S. at 11 n.7.

III. The government cannot carry its burden under exacting scrutiny in this narrow, as-applied challenge.

Exacting scrutiny is a "strict test," *Buckley*, 424 U.S. at 66, that demands careful review of both the asserted governmental interest *and* whether the law is tailored to that interest. *McCutcheon,* 134 S. Ct. at 1456 ("In the First Amendment context, fit matters."). The federal

[16] *Amici* believe that the concern over § 437a was about political committee status. *Amici* CLC Br. at 11. Judge Tamm's concerns about disclosure refute that reading of *Buckley '75*. *See id.* at 914 (Tamm, J., concurring in part and dissenting in part).

campaign finance laws' intrusions on issue speech and associational privacy can only be justified by the informational interest—by providing information that informs the public about those supporting or opposing candidates. But that interest does not extend to the communication here, and expanding the informational interest to all communications even mentioning a candidate, regardless of other content, unnecessarily burdens issue speech calling for official action.

a. The FEC has no legitimate interest in issue speech that in no way electioneers.

The FEC confuses the interests at issue here, and it thus treats issue speech as less worthy of First Amendment protection than political speech in other areas where the government's interests are much clearer. It even suggests that the discussion of political issues is less protected than commercial speech or lobbying. But the Supreme Court has repeatedly held that the Commission "operate[s] in an area of the most fundamental First Amendment activities," *McCutcheon*, 134 S. Ct. at 1444 (Roberts, C.J., plurality op.), and that—as discussed below—the First Amendment gives special protection to issue speech in particular.

For example, the FEC takes statements in *Citizens United* out of context to suggest that issue speech is less protected than commercial speech. *See* FEC Br. at 21-22. In the passages quoted, however, the *Citizens United* Court was addressing the argument that several ads attacking Hillary Clinton were merely commercial advertisements encouraging people to see a movie and thus should not be regulated under BCRA. The Supreme Court saw these ads for what they were: "pejorative" statements about Hillary Clinton. *Citizens United*, 558 U.S. at 320. Because the ads carried information about Hillary Clinton, and were intimately tied to those opposing her through the related movie, the Supreme Court concluded that the informational "interest in knowing who is speaking about a candidate shortly before an election" justified

application of the law to the ads. *Id*. at 369. The FEC fails to note that this case has nothing to do with speaking about legislators, but with speaking to them about important public issues.

Furthermore, the FEC commits a basic category error in using cases permitting control of commercial speech to justify the control of political speech.[17] The Government's interests in the two contexts are dissimilar. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) ("[T]he government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'") (citation omitted).[18] Put simply, the argument that the ads in *Citizens United* should not be regulated because they were mere commercial speech—speech entitled to comparatively-slight constitutional protection—failed before the Supreme Court. But that does not mean that the Court's ruling reached genuine issue ads, which are entitled to far greater protection.[19]

The FEC also errs in simply assuming that the entire range of issue speech may be regulated because the Supreme Court has blessed the regulation of advocacy concerning ballot initiatives, where the people act directly as the legislative branch.[20] The biggest difference between this case and the ballot issues context is that ballot advocacy is unambiguously

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[17] *See* FEC Br. at 20.

[18] *See also United States v. Williams*, 553 U.S. 285, 298 (2008) (noting that "the First Amendment status of commercial speech" is "less privileged" than other forms of speech). In fact, the government may *compel* speech in the commercial context in a way it cannot for discussions of public policy. *Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) ("The Government has long required commercial disclosures to prevent consumer deception or to ensure consumer health or safety"); *see also R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) (noting that there was no dispute about Congress's authority to require health warnings on cigarette packages).

[19] Likewise, the Commission's citation to *Hispanic Leadership Fund v. FEC* is inapposite. 897 F. Supp. 2d 407 (E.D. Va. 2012). That case largely turned on whether or not five specific communications were electioneering communications at all. *Id*. at 416. In any event, the plaintiff's communications were dissimilar from the Institute's. Each ad criticized a specific, ongoing policy of the Obama administration, and encouraged viewers to take action against that policy, just before the 2012 Presidential election. *Id*. at 416-418.

[20] *See* FEC Br. at 22-23; *see also Amici* CLC Br. at 16.

campaign related—it involves express advocacy concerning specific measures that will be on a ballot. The same interest is not present here, because BCRA's disclosure rules give no information about those supporting or opposing any question being put to the voters.

The FEC further errs in attempting to justify its restrictions on political activity using lobbying disclosure laws. The FEC relies on *United States v. Harriss*, 347 U.S. 612 (1954), FEC Br. at 24, but both the FEC and the courts citing to *Harriss* have acted as if the state of campaign finance regulation has stayed in stasis ever since 1954. The Supreme Court has not revisited lobbying disclosure in the last 60 years, but it has drastically altered the range of constitutional protection for associational privacy, in decisions from *NAACP v. Alabama* and *Buckley* to *McConnell* and *Citizens United*. And the changes brought on by these cases are immense: The Supreme Court in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), recognized the rights to both political association and political expression, including the right to anonymity in membership lists. *Id*. at 462. The Court has articulated a "strict standard of scrutiny," one in line with *NAACP v. Alabama*, to protect "the right of associational privacy." *Buckley*, 424 U.S. at 75. Furthermore, "the Supreme Court has recognized three proper justifications for reporting and disclos[ure]" laws: the anticircumvention, anticorruption, and informational interests. *Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010) (quoting *Buckley*, 424 U.S. at 67-68).[21] Given that *Harriss* was decided before the Supreme Court recognized the right of associational privacy and the

[21] These three proper justifications for disclosure are circumscribed. The *McCutcheon* Court, for example, limited the anticorruption interest to *quid pro quo* corruption (or its appearance), which requires the exchange of an official act for money. 134 S. Ct. at 1441, 1451. With regard to the informational interest, the *Buckley* Court limited that interest to disclosure that "increases the fund of information concerning those who support the candidates." 424 U.S. at 81. And, as the Tenth Circuit has noted, the Supreme Court has limited even that to those who "have a financial interest in the outcome of the election." *Sampson*, 625 F.3d at 1259. The FEC however, would expand the informational interest to cover any important public issue, based on the principle that enquiring minds want to know. *See* FEC Br. at 23 n.5.

dangers of compelled disclosure to association, it is doubtful that donor privacy concerns were considered when the Supreme Court decided *Harriss*.[22]

Furthermore, although *Harriss* was decided before the Supreme Court articulated the interests the government must meet to pass scrutiny, the Court has begun to interpret and apply *Harriss* in light of those interests. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), for example, the Supreme Court stated that it had upheld "*limited* disclosure requirements for lobbyists" in *Harriss* and noted the "appearance of corruption" created by "lobbyists who have direct access to elected representatives." *Id.* at 356 n. 20 (emphasis added); *cf. Randall v. Sorrell*, 548 U.S. 230, 274 (2006) (Stevens, J., dissenting) (stating that *Buckley* overturned *Harriss*, which had allowed limitations on expenditures as permissible regulations of conduct). The FEC has not demonstrated any risk of corruption or its appearance related to the Independence Institute's activities. *Citizens United*, 558 U.S. at 357 (*Buckley* "did not extend [the anti-corruption] rationale to independent expenditures, and the Court does not do so here").

Furthermore, the *McIntyre* Court's discussion of the anticorruption interest highlights another problem with the FEC's misappropriation of *Harriss:* that case dealt with professional lobbyists who were paid "to communicate face-to-face with members of Congress, at public functions and committee hearings, [and] to induce" letter writing campaigns. *Harriss*, 347 U.S. at 615. This case deals with neither professional lobbyists nor professional lobbyists meeting face-to-face with members of Congress, wining and dining them. Lobbying disclosure, in short,

[22] Moreover, as this court and other courts have recognized, there is uncertainty even about what standard the Supreme Court applied in *Harriss*. *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 49 (D.D.C. 2008) (applying strict scrutiny without deciding whether strict or heightened scrutiny applies); *see also Tennant*, 706 F.3d at 287 (requiring that provisions of lobbying regulation scheme meet exacting scrutiny); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 10 (D.C. Cir. 2009) (holding that lobbying disclosure statute must meet strict or heightened scrutiny).

is a "self-protection" [23] mechanism intended to limit corruption, while the Supreme Court has explicitly stated that independent speech of the type suggested here does not implicate the government's anticorruption interest.

The FEC has failed to demonstrate that it has a "sufficiently important governmental interest" in the disclosure here. *Citizens United*, 558 U.S. at 359; *id*. at 366-67; *see also Tennant*, 706 F.3d at 287 (noting that "the Supreme Court has been loath to endorse" regulation of "true issue advocacy."). The information requested would tell voters nothing about those supporting or opposing a candidate.

b. The harm imposed upon the Institute outweighs the FEC's interest in disclosure for issue advocacy not related to any candidacy or election.

i. The harm of public disclosure goes beyond threats, harassment, or reprisals.

Under the FEC's theory of disclosure, the only viable as-applied challenge is one where there are documented threats, harassments, or reprisals. FEC Br. 36. The Institute does not assert a *specifically higher* risk of threats, harassment, or reprisals. Joint Stipulation and Order at 1 (ECF No. 14). But the Supreme Court has long recognized the general and universal danger of threats, harassments, and reprisals, and it is for precisely that reason that disclosure provisions are required to survive exacting scrutiny. Moreover, unlike the *Buckley*, *McConnell*, or *Citizens United* plaintiffs, the Independence Institute is a non-political think tank that does not disclose its donors. Disclosure itself is the harm.

Talley v. California, 362 U.S. 60 (1960), establishes that the right to private association is not limited to individuals or groups subject to threats, harassments, or reprisals. The record in that case was "barren of any claim, much less proof, that [Talley would] suffer any injury

[23] *Harriss*, 347 U.S. at 625 (observing that to deny Congress the ability to know the identities of those "being hired, who is putting up the money, and how much" would deny it "the power of self-protection").

whatever by identifying the handbill with his name." *Id.* at 69 (Clark, J. dissenting). Indeed, the dissent claimed that Talley's case was "[u]nlike *NAACP v. Alabama*… [in that] no proof [was proffered] that Talley *or any group sponsoring him* would suffer economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility." *Id.* (internal citation and quotation marks omitted, emphasis added). Nevertheless, the majority held, "there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. . . . The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.* at 65

While *Buckley* approved disclosure, it did so only for narrowly-defined organizations (or activities) that were unambiguously campaign related. 424 U.S. at 81. Because *Buckley* was a facial ruling, it could not have been premised upon a record concerning the threats, harassment, or reprisal of particular donors. It nevertheless held that privacy of association is a protected constitutional right. *Id*. at 80. In reserving the future possibility that a particular political committee—as defined under a narrowed, constitutional statute—could bring an as-applied challenge on the basis of threats, harassment, or reprisals, it was not undoing the underlying work that narrowed FECA's reach. *Id*. at 74. Nor was it stating that this was the only ground upon which an as-applied case could be brought.[24]

To counter this analysis, the FEC cites an unrelated case, *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (U.S. 2015). FEC Br. at 32. *Harris*, however, is not a campaign finance case, and in that case "the disclosure would not be

[24] This is obvious from the as-applied challenges that were, in fact, subsequently brought. *See, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*").

public." *Id*. at 1316. In stark contrast, electioneering communications reports are published world-wide on the Internet. 52 U.S.C. § 30112.[25] The case is simply inapplicable.

Consequently, the lack of *specific* threats does not change the fact that forced public disclosure is *inherently* risky—particularly for § 501(c)(3) organizations–and that this case is subject to heightened constitutional scrutiny.

ii. The alternative "separate bank account" to protect general donor disclosure is burdensome.

The FEC argues that only *earmarked* donations are publically disclosed.[26] FEC Br. at 37. But, in the alternative, the FEC proposes a separate segregated account under 52 U.S.C. § 30104(f)(2)(E) and 11 C.F.R. § 104.20(c)(7)—an idea that has been repeatedly rebuffed by the Supreme Court because it inherently restricts organizational fundraising. In fact, the *Citizens United* Court expressly rejected the "separate bank account" theory in part because it severely limits who may contribute to the account. 558 U.S. at 328.

The FEC's interest in such segregated funds is clearer if they are used to pay for ads that actually electioneer for or against candidates. But, here, such limitations hamper an organization speaking about public policy. Limiting funding sources to nonprofits is a key consideration in finding a campaign finance provision too burdensome. *See*, *e.g.*, *MCFL*, 479 U.S. at 266 (O'Connor, J., concurring) ("additional requirements [must] further the Government's informational interest in campaign disclosure. . . ."). Where, as here, the FEC would impose an additional administrative burden upon a nonprofit discussing an issue of public importance, and

[25] This universal dissemination of campaign finance reports only heightens the risk of harassment. *See Doe v. Reed*, 561 U.S. 186, 242 (2010) (Thomas, J., dissenting) (recognizing "the state of technology today creates at least *some* probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed") (emphasis in original).

[26] Of course, the balance of harm to the Institute and its donors would tilt even further in its direction if *Van Hollen* is overturned. The Institute preserves that point in the event the en banc D.C. Circuit overturns the panel's decision. *See* Mot. for Summ. J. at 9 n.3.

hamper its ability to fund that speech from its general treasury, its interest is simply too slight to justify the restriction.

IV. Granting summary judgment to the Institute preserves the vast majority of regulation and disclosure for electioneering communications while providing narrow, as-applied relief for the Institute's issue advocacy.

Ruling in favor of the Institute's as-applied challenge would not prevent the regulation of most electioneering communications. Congress in fact anticipated constitutional issues like those raised here and provided a backup definition for electioneering communications—the so-called PASO (Promotes, Attacks, Supports, or Opposes) standard. That standard has been blessed by the Supreme Court and has proven useful to courts examining similar state statutes. Moreover, a ruling for the Institute will provide the Commission with an opportunity to adjust its regulations to provide better-tailored guidance to the regulated community.

a. Congress provided for a backup definition (PASO) in case the scope of "electioneering communications" regulation violated the First Amendment.

Under BCRA's backup definition, any communication in the electioneering communications window that Promotes, Attacks, Supports, or Opposes ("PASO") a candidate may be regulated "regardless of whether the communication expressly advocates a vote for or against a candidate." 52 U.S.C. § 30104(f)(3)(A)(ii); *see* Mot. for Summary J. at 38. In short, even if the Institute wins this challenge, the overwhelming majority of material the Commission has an interest in regulating would remain firmly within its jurisdiction.

The PASO standard already enjoys the Supreme Court's approval. *McConnell,* 540 U.S. at 170 n.64. Discussing a facial vagueness claim, the *McConnell* Court stated that "The words 'promote,' 'oppose,' 'attack,' and 'support' clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision." *Id.*

Moreover, the PASO standard has proven workable in the states. The First Circuit used a similar promotes or opposes construction to narrow an otherwise overbroad Maine law. *See McKee*, 649 F.3d at 62-63. As the First Circuit noted, such a standard "succeeds both in 'provid[ing] explicit standards for those who apply' the provisions at issue here and in ensuring that persons of average intelligence will have reasonable notice of the provisions' coverage." *Id*. at 67 (citation omitted) (alteration in *McKee*). Other circuits have followed the *McKee* decision in approving similar PASO standards for other state campaign finance regimes. In *Madigan*, for example, the Seventh Circuit upheld an Illinois law using the PASO standard. 697 F.3d at 486. Similarly, and even more recently, the Second Circuit upheld Vermont's PASO standard in a law regulating electioneering communications. *Vt. Right to Life Comm*, 758 F.3d at 128-29 (comparing Vermont's law with the federal PASO standard).

Indeed, one need only look to the effect, or lack thereof, that adoption of the PASO standard would have had on *Citizens United*. Those "pejorative" ads, *Citizens United*, 558 U.S. at 320, are *precisely* the types of campaign speech meant to be regulated under the PASO standard, as they attacked and opposed then-Senator Clinton. *See Citizens United*, 530 F. Supp. 2d at 276 n.2-4 (setting forth ad scripts).

b. The FEC can, and has, implemented as-applied rulings distinguishing among different forms of speech and different types of speakers.

An as-applied ruling narrowing the field of political regulation would not be unprecedented and would not create havoc. The Commission has adjusted to such ruling before, with notable success—even in cases where the law did not provide a backup standard. Examples include new rules implementing *WRTL II* and the fact-specific ruling in *MCFL*.

In *WRTL II*, the Supreme Court examined a ban on speech by corporations during the electioneering communication window, 551 U.S. at 455-56, and set about separating "corporate

campaign speech or its functional equivalent" from "issue advocacy."[27] *Id*. at 457. The controlling opinion contrasted the "functional equivalent of express advocacy" with issue advocacy that merely mentions a candidate and prohibited FEC regulation of the latter category. *Id*. at 469-70.[28]

Within six months of the decision,[29] the FEC promulgated rules giving effect to *WRTL II* in analogous future circumstances. FEC, Electioneering Communications, 72 Fed. Reg. 72899, 72900 (Dec. 26, 2007). After taking public testimony, the Commission created a "non-exclusive list of examples that will be considered to 'mention' an election, candidacy, political party, opposing candidate or voting by the general public" that could trigger electioneering communication regulation and disclosure. 72 Fed. Reg. at 72903. These rules successfully differentiated between "tag lines that suggest voting by the general public in elections, such as 'Vote. It's important to your future,'" and issue speech "such as 'ask Congressman Smith to support the Voting Rights Bill.'" *Id*.[30]

The rulemaking after the Court's *MCFL* ruling shows that the FEC's ability to incorporate judicial reasoning after *WRTL II* was not an outlier, but instead a normal practice for the administrative agency. In *MCFL* the Supreme Court considered whether a nonprofit corporation could be constitutionally prohibited from creating a voter guide shortly before an

[27] The Institute asserts that "unambiguously campaign related" speech, including express advocacy and its functional equivalent, is distinct from issue advocacy that merely mentions a candidate. Issue advocacy has been protected from federal campaign finance law since *Buckley*.

[28] Chief Justice Roberts' *WRTL II* test for deciphering the functional equivalent of express advocacy was a plurality opinion on the narrowest grounds, but a five vote majority of the Supreme Court approved it in *Citizens United*. *See* 558 U.S. at 324-25; *id*. at 334-35.

[29] *WRTL II* came down on June 25, 2007. 551 U.S. at 449.

[30] Nor is the FEC likely to go beyond a successful as-applied challenge to damage the effective regulation of electioneering communications. In its rulemaking after *WRTL II*, the Commission was careful not to go beyond the scope of the Supreme Court's holding in *WRTL II*. *See* 72 Fed. Reg. at 72901.

election.[31] 479 U.S. at 241. In granting MCFL as-applied relief, the Court noted three key "features essential to [its] holding that [MCFL] may not constitutionally be bound by [52 U.S.C. § 30118]'s restriction on independent spending." *Id*. at 263-64. Subsequently, the Commission recognized the Court's three-factor test and promulgated a rule for groups, "Qualifying Nonprofit Corporations," meeting that standard. FEC, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35296 (July 6, 1995) (applying *MCFL*, 479 U.S. at 264).

Under either the PASO backup definition or this Court's application of the "unambiguously campaign related" test, the FEC will have all the tools necessary to uphold the electioneering communications law where it regulates actual electioneering, while protecting the First Amendment right to discuss public policy without reporting to the government.

Conclusion

Summary judgment should be granted to the Institute.

Respectfully submitted,

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Dated: August 12, 2016

[31] At the time, federal law prohibited "corporations from using treasury funds to make an expenditure 'in connection with' any federal election, and require[d] that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund." *Id*. (quoting 52 U.S.C. § 30118). This provision of federal campaign finance law was found unconstitutional in *Citizens United*, 558 U.S. at 372.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Independence Institute's Consolidated Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Its Motion for Summary Judgment using the court's CM/ECF system. A Notice of Docket Activity will be emailed to all registered attorneys currently participating in this case, constituting service on those attorneys:

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